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Businesses Fear Case May Bring Courts Into Partnership Matters

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EMPLOYMENT LAW

By Eric J. Wallach

Businesses Fear Case May Bring Courts Into Partnership Matters

THE CELEBRATED *Hopkins v. Price Waterhouse* case produced another momentous decision recently when the U.S. District Court for the District of Columbia ruled that Price Waterhouse had discriminated against Anne Hopkins because of her sex in denying her partnership status and ordered the accounting firm to reinstate her, as a partner, effective July 1, 1990.[1] The holding by Judge Gerhard Gesell sent shock waves through the professional and business communities. It is one of the first court-mandated reinstatement decisions that goes beyond mere continuation of employment or even enforced promotion of an employee.

Judge Gesell's ruling potentially opens the door for judicial intervention in the up-to-now highly subjective and largely unregulated field of partnership and senior executive decisions. What remains to be seen is whether this ruling augurs a new era of increased regulation of employment decisions, or whether it is an aberration — the product of the combination of an insensitive employer, a sympathetic plaintiff and an activist judge.

Ms. Hopkins had been working as a senior manager at Price Waterhouse's Washington, D.C., office for approximately five years when she first came up for partnership consideration in 1982. She was the only female among 88 candidates for partnership that year. Exceptional in her job-related accomplishments, she was described by colleagues as "an outstanding professional" and as "extremely competent, intelligent."[2] In addition, Ms. Hopkins had distinguished herself from other candidates for partnership by her remarkable success in producing new business for her firm.

Yet Anne Hopkins was not elected a partner at Price Waterhouse. Certain partners evaluating her claimed that she was difficult to get along with and especially short-tempered with the staff. These otherwise facially valid criticisms took on another tone, however, when the commenting partners also characterized Ms. Hopkins as too "macho" and needing a course in charm school. A key partner in Ms. Hopkins' office at Price Waterhouse advised her to "walk more femininely, talk more femininely, wear make-up, have her hair styled, and wear jewelry."[3]

AFTER definitively being denied partnership in 1983, Ms. Hopkins resigned. She then commenced an action against Price Waterhouse, alleging sex discrimination in violation of Title VII of the Civil Rights Act of 1964.[4] Judge Gesell determined at the original trial that Price Waterhouse's partnership decision was indeed tainted by impermissible sexual stereotyping, and that under Title VII, Ms. Hopkins was entitled to monetary relief.[5] The court declined, however, to order that Ms. Hopkins be reinstated at Price Waterhouse because it found that the record did not sufficiently support her assertion that the denial of partnership status was tantamount to a constructive discharge.[6]

The U.S. Circuit Court of Appeals for the District of Columbia affirmed Judge Gesell's finding that impermissible sexual stereotyping played a significant, negative role in Ms. Hopkins' bid for partnership. The D.C. Circuit went further, however, by reversing the trial court on the constructive discharge issue. Specifically, it held that "Price Waterhouse's decision to deny Hopkins partnership status...coupled with [her department's] failure to renominate her, would have been viewed by any reasonable senior manager in her position as a career-ending action."[7]

The U.S. Supreme Court granted certiorari, and a majority affirmed the findings of the lower courts with respect to the discriminatory taint involved in Price Waterhouse's consideration of Ms. Hopkins' partnership candidacy. In addition, the court made an important procedural determination. It ruled that once, as in this case, the plaintiff shows that a discriminatory reason plays a motivating part in an employment decision, the burden shifts to the employer to show that it would have made the same decision even if it had not allowed the illegitimate motive to play a role.[8] The case was remanded to the trial court for determination under this relaxed standard of proof applicable to plaintiffs such as Ms. Hopkins.

On remand, Judge Gesell issued his reinstatement order.[9] It should be recalled that Title VII explicitly provides for reinstatement as a remedy for employment discrimination based on race, color, religion, sex or national origin. The statute recites, in relevant part, that

> [i]f the court finds that the respondent has intentionally engaged or is intentionally engaging in an unlawful employment practice...the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees...or any other equitable relief as the court deems appropriate."[10]

The Supreme Court expressly confirmed judicial authority to order reinstatement with constructive or full seniority as relief for victims of discrimination in *Franks v. Bowman Transportation Co.*[11] and *Albemarle Paper Co. v. Moody.*[12] Indeed, reinstatement historically was established before the enactment of Title VII as a remedy for discriminatory employment practices. In an early Supreme Court employment discrimination case involving the discharge of workers for their union activities, Justice Felix Frankfurter stated that "[r]einstatement is the conventional correction for discriminatory discharges."[13]

In the context of equal employment opportunity, the argument for the appropriateness of reinstatement as a remedy becomes even more compelling, given the objective of Title VII to compensate for the harmful effects of past discrimination. Cases in this area routinely reiterate the language of *Franks* and *Albemarle Paper* that courts must strive to grant "the most complete relief possible" for Title VII violations, emphasizing that the victim must be made "whole" by being placed — as closely as possible — in the situation he or she would have occupied but for the discriminatory acts.

Yet in distinct counterpoint to the reasoning that would "make whole" the victim of unlawful discrimination lies the historical reluctance of courts specifically to enforce personal service contracts.[14] Like the paradigmatic contract dispute in which the court would not force the soprano to perform against her wishes,[15] courts often shy away from compelling an employment situation that would force together unwilling participants.

It is the tension between these competing principles — the desire to put victims of discrimination into the position they would have occupied but for the unlawful acts, and the reluctance to mandate an unwanted employment relation — that shapes the history of the reinstatement remedy, and its relatively infrequent use, in Title VII litigation.

COURTS THAT have declined to grant reinstatement in Title VII cases have cited the traditional argument against compelling the continuation of an employment situation that has become intolerable to one or both parties, because it lacks the mutual trust and confidence required in such a relation.

The U.S. District Court for the Southern District of New York in *EEOC v. Kallir, Philips, Ross Inc.*[16] used precisely this reasoning to deny reinstatement to a high-level advertising executive who had been discharged from her firm in retaliation for filing a sex discrimination charge against it. The decision emphasized the hostile and confrontational relationship that existed between the two parties. The court stated that in employment situations that require a close working relationship between the Title VII plaintiff and the top executives of the defendant firm, a lack of complete trust and confidence "could lead to misunderstandings, misrepresentations and mistakes, and could seriously damage defendant's relationship with its clients."[17]

The same result has occurred in other, similar cases. Courts have concluded that reinstatement of a high-level employee was precluded because of the estrangement of the plaintiff from the employer,[18] and found that the level of bitterness and antagonism existing between employee and employer mandated alternative forms of relief.[19]

The question remains, then, as to the circumstances that prompted Judge Gesell to order Ms. Hopkins's reinstatement. There was ample evidence in the record concerning the accumulated hostility between the Price Waterhouse partners and Ms. Hopkins. By no stretch of the imagination could a court have expected that Price Waterhouse would welcome Ms. Hopkins warmly or enthusiastically to the partnership. Judge Gesell acknowledged his awareness of these considerations and noted that the specter of workplace antagonism is a relevant factor in weighing the appropriateness of reinstatement.[20]

The court did not adopt this reasoning, however, in reaching its conclusion. Instead, Judge Gesell analyzed a

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> The *Hopkins* case sent shock waves through the professional community. It is one of the first cases in which the court's mandate went beyond mere continuation of employment or forced promotion.

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variety of other important elements, focusing on the character of Price Waterhouse. He portrayed the firm as an entity that, although nominally functioning as a partnership, was more accurately described as a "national concern [that] lacks the intimacy and interdependence of smaller partnerships." The court emphasized the size (approximately 900 partners in 90 offices) and structure (no ceiling placed on the number of partners) of the firm in depicting Price Waterhouse not as a tight-knit partnership whose delicate balance of cooperation and collegiality would be upset by the imposition of an unwanted partner, but instead as an immense, impersonal outpost of corporate America.

This aspect of Judge Gesell's analysis, while perhaps unique in its application, is not without precedent. The rationale for reinstatement as a remedy has long been regarded as more applicable to job categories involving impersonal or routine responsibilities," as opposed to highly influential, decision-making positions in which the reinstatement of an antagonistic or disliked employee could have profoundly divisive results. Courts themselves have drawn such a distinction. In *EEOC v. Kallir, Philips, Ross Inc.*,

> Title VII specifically includes reinstatement as a remedy, yet courts historically have been reluctant to order it.

the court partially supported its denial of reinstatement on the basis of this rationale: "The situation here is quite unlike that presented when reinstatement is sought for an assembly line or clerical worker, or even for an executive whose job is not as sensitive for his employer's interests as is plaintiff's job here."[1]

Beyond focusing on the perceived impersonality of Price Waterhouse, Judge Gesell also predicated the appropriateness of reinstatement on a series of factors that may be instructive in other prospective situations. To begin with, the court stated the proposition that reinstatement was "always [Ms. Hopkins'] objective" in the litigation. Implicit in this reasoning is the notion that in Ms. Hopkins' field, there might have been no adequate substitute for a partnership with as prestigious and prominent a firm as Price Waterhouse.

In addition, Judge Gesell commented on the speculative nature of the alternative of front pay, which might confer "a wholly unwarranted windfall" on Ms. Hopkins (or, for that matter, on Price Waterhouse). Thus, he stressed the impossibility of predicting with any certainty the likelihood or degree of financial or professional success that Ms. Hopkins (or Price Waterhouse) might enjoy in the years ahead.

Finally, and tellingly, the court emphasized its doubt "as to whether monetary relief alone provides a sufficient deterrent against future discrimination for a group of highly-paid partners." Judge Gesell commented on the apparent futility of merely having Price Waterhouse take "a new vote" on Ms. Hopkins' partnership candidacy, and specifically enjoined Price Waterhouse from retaliating against Ms. Hopkins upon her admission to the partnership.

IT SHOULD BE stressed that Judge Gesell characterized his reinstatement order as flowing naturally from the U.S. Supreme Court's 1984 decision in *Hishon v. King & Spalding.*[2] That case established the predicate proposition that, within the context of professional partnerships, partnership admission decisions are among the terms, conditions or privileges of employment and thus come within the reach of Title VII.

That principle having been settled, Judge Gesell concluded that "there is no logical reason that the full range of Title VII remedies aimed at making the claimant whole are not appropriate." In reaching this result, the court dismissed as irrelevant the fact that in *Hishon*, the plaintiff was not seeking, and did not obtain, reinstatement.

In this regard, Judge Gesell correctly gauged the seminal impact of the decision in *Hishon* in expanding the reach of Title VII to a variety of hybrid and formerly unregulated employment relationships. Thus, for instance, in *Hyland v. New Haven Radiology Associates P.C.*, the 2d Circuit, citing the rule in *Hishon*, ruled that the employer could not avoid the employment discrimination laws merely by characterizing its employees as partners or shareholders in the concern."

To the same effect, in *Mozee v. Jeffboat Inc.*, the 7th Circuit decided on the basis of *Hishon* that a promotion that would place the plaintiff outside of the protected employee class does not immunize the promotion from Title VII scrutiny." Similarly noteworthy is the holding by the District Court for the Southern District of Florida in *Sennello v. Reserve Life Insurance Co.* that, in accordance with the logic of *Hishon*, an employee cannot evade Title VII liability by using the expedient of demoting employees to unprotected sta-

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tus shortly before firing them.[25]

Although not cited by Judge Gesell in his opinion, the recent U.S. Supreme Court holding in *University of Pennsylvania v. EEOC*[26] contributes to the context in which *Hopkins v. Price Waterhouse* was decided. That case involved a claim by a female faculty member that she had been discriminated against on account of sex in regard to the decision by the Wharton School of Business denying her tenure. The case reached the Supreme Court on the issue of whether the university could be compelled to disclose confidential peer review materials used in the decision-making process. The Supreme Court ruled that a showing of mere relevance, as opposed to a judicial finding of "particularized necessity of access," sufficed to require disclosure of the documents in question.

Writing for the court, Justice Harry Blackmun made it plain that he viewed the decision as one of general application. Assuming, for instance, that "confidential peer reviews play an important part in partnership determinations at some law firms," Justice Blackmun professed himself unable to discern a "limiting principle" in the University of Pennsylvania's position. He clearly prescribed that all such materials and deliberations were proper subjects of discovery in Title VII proceedings. At least by implication, the Supreme Court was availing plaintiffs of the practical means to exercise the rights defined in cases such as *Hishon*.

The critical issue is assessing the prospective impact of Judge Gesell's reinstatement order. At a minimum, this decision changes the rules of the game by increasing to some degree the exposure of defendant employers and

> The court portrayed the firm as a huge business entity that was closer to a 'national concern' than to a partnership.

adding a new and credible weapon to the arsenal of the plaintiffs' bar.

ON BALANCE, however, it seems highly unlikely that courts will fix upon reinstatement as the remedy of choice in discrimination cases or that business and the professions will face a tidal wave of court-ordered reinstatement decisions. The more probable and well-advised outcome is that *Hopkins v. Price Waterhouse* will be narrowly construed on the basis of its unique fact pattern and that it will represent the exception rather than the rule with regard to appropriate remedies in Title VI I and other equal employment opportunity lawsuits.

Several important factors militate in favor of this conclusion. First, the court expressly acknowledged that the specter of extreme workplace hostility remains a key issue to be weighed in future cases in assessing the propriety of reinstatement. As in the past, this part of the equation may well continue to be outcome-determinative in most proceedings. In other words, courts are likely to remain reluctant to impose employees on unwilling employers.

Second, Judge Gesell explicitly distinguished the myriad situations implicating "the intimacy and interdependence of smaller partnerships" from the matter at hand. Presumably, the same distinction would apply in business contexts in which the reinstatement issue affected an executive or policy-making position.

Third, Judge Gesell rationalized in part the intrusion on Price Waterhouse's internal affairs based on his conviction that, given the company's size, scope and character, Ms. Hopkins would not have "significant influence" on the firm as a new partner. There is no reason to believe that the same result would occur in circumstances in which this element was absent or even in doubt.

Finally, the court's determination that reinstatement was a better deterrent to unlawful discrimination than a front-pay award is, at best, a highly controversial thesis. Other tribunals might well conclude that money damages convey a sharper message to the offending employer (and to other similarly situated employers) than the court-ordered reinstatement of an ostensibly qualified, albeit unwanted, employee.

Even by its own terms, the reinstatement decision in *Hopkins v. Price Waterhouse* does not change the traditional disinclination of courts to interfere with the financial or commercial affairs or the governance of businesses and professional firms. Instead, it appears to reflect the simple determination that, given the extreme circumstances of this particular case, a large concern such as Price Waterhouse could tolerate without undue difficulty or disharmony the addition of Ms. Hopkins to the partnership.

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(1) Hopkins v. Price Waterhouse, F. Supp. (D.D.C. 1990), 52 FEP Cases 1275.
(2) Price Waterhouse v. Hopkins, 109 S. Ct. 1775, 1782 (1989).
(3) Hopkins v. Price Waterhouse, 618 F. Supp. 1109, 1112, 1117 (D.D.C. 1985).
(4) 42 U.S.C. 2000e et seq.
(5) 618 F. Supp. 1109 (D.D.C. 1985).
(6) Id. at 1121.
(7) Hopkins v. Price Waterhouse, 825 F.2d 458, 473 (D.C. Cir. 1987).
(8) Beyond this, the holding was to the effect that when a plaintiff in a Title VII proceeding has proven that his or her gender has influenced an employer's decisions regarding a position, the defendant employer may avoid liability by proving by a preponderance of the evidence that it would have reached the same decision even if it had not taken the plaintiff's gender into account. The evidentiary standard used before this decision, and by the lower courts in this case, was the more exacting "clear and convincing evidence" standard.
(9) Hopkins v. Price Waterhouse, F. Supp. (D.D.C. 1990), 52 FEP Cases 1275.
(10) 42 U.S.C. 2000e-5(g).
(11) 424 U.S. 747 (1976).
(12) 422 U.S. 405 (1975) (discussing remedial provisions and intent of Title VII).
(13) Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 187 (1941).
(14) See Restatement (2d) of Contracts Secs. 367, 368 (1981). Although many current employment situations do not involve an express written contract, even oral employment contracts that do not extend for a definite period of time and are terminable at will of either party generally are not specifically enforced.
(15) Lumley v. Wagner, 1 De Gex, M. & G. 616 (1852)..
(16) 420 F. Supp. 919 (S.D.N.Y. 1976), aff'd without opinion, 559 F.2d 1203.
(17) Hyland v. Kenner Prod. Co., 11 CCH Empl. Prac. Dec. par. 10, 926 (S.D. Ohio May 5, 1976).
(18) Cancellier v. Federated Dep't Stores, 672 F.2d 1312 (9th Cir. 1982). See also Combes v. Griffin Television, Inc., 421 F. Supp. 841 (W.D. Okla. 1976).
(19) Hopkins v. Price Waterhouse, 52 FEP Cases at 1282. In connection with this proposition, Judge Gesell cited Cassino v. Reichhold Chem., Inc., 817 F.2d 1338, 1347 (9th Cir. 1987), cert. denied, 484 U.S. 1047 (1988).
(20) See Van Hecke, "Changing Emphasis in Specific Performance," 40 N.C.L. Rev. 1 (1961).
(21) 420 F. Supp. at 927.
(22) 467 U.S. 69 (1984).
(23) 794 F.2d 793 (2d Cir. 1986).
(24) 746 F.2d 365 (7th Cir. 1984).
(25) 667 F. Supp. 1498 (S.D. Fla. 1987).
(26) 110 S. Ct. 577 (1990).

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